Young Kee Chan & Ors v Phileo Allied Finance (M) Bhd

HIGH COURT (TEMERLOH) — CIVIL SUIT NO 22-28 OF 1997
HISHAMUDIN YUNUS J
14 MARCH 2000

Land Law *— Charge — Creation of — Charge created under substituted power of attorney — Power to charge land under initial power of attorney limited — Whether powers of substituted attorneys to charge land limited by initial power of attorney*

The eleven plaintiffs were proprietors of a plot of land. In 1989, the third to eleventh plaintiffs granted to the first and second plaintiffs an irrevocable power of attorney ('PA'). Amongst other things, the PA empowered the first and second plaintiffs to 'charge or mortgage or transfer the lands as the attorneys think proper, fit and necessary in so far as the developers lots [are] concerned' and to appoint substituted attorneys. Pursuant to the powers granted to them under the PA, the first and second plaintiffs signed an agreement with a developer with a view to jointly developing the property. The agreement, inter alia, authorized the developer to use the property 'for obtaining pre-develop[ment] funds and upon the issuance of individual titles only the developers lots can be charged to the bank and the owners lots shall be free of encumbrances'. Although all the plaintiffs were named as landowners in the agreement, it was signed only by the first and second plaintiffs. The developers subsequently charged the land to the defendant in 1993 for a loan of RM250,000. In October 1997, the plaintiffs were served with a foreclosure notice. The plaintiff claimed that the charge was registered without their knowledge and filed a suit against the defendant. The plaintiffs then applied for summary judgment, contending that the developer was only empowered to charge 'developer's lots' and not the whole property. It was also contended that the developer was a substituted attorney appointed by the first and second plaintiffs, having entered into the agreement with the first and second plaintiffs, in their own behalf and as attorneys of the other co-owners. As such, its power to charge the property was restricted by the first PA. The defendant on the other hand submitted that the agreement was an agreement between all the eleven plaintiffs and the developer; that the power to charge the property under the agreement is independent of the first PA; that the developer was not a substituted attorney; and that the rights conferred on the developer under the agreement were not restricted by the provisions of the first PA.

Held, allowing the plaintiffs to enter summary judgment:

(1) The agreement was a valid agreement signed by the first and second plaintiffs on their own behalf and as attorneys for the co-proprietors (see p 225C): (i) there were clear averments in the first and second plaintiffs' affidavit explaining that such was the case; (ii) these averments were not rebutted by any of the defendant's

affidavits, but accepted in their counsel's written submission; (iii) it was common ground between the plaintiffs and defendant that the agreement is a valid agreement (see pp 224H–I, 225A–B).

(2) A substituted PA cannot have more rights or powers than the original PA. As the agreement was created by virtue of the first PA, it is a substituted PA and must be limited by the rights of the first and second plaintiffs to charge only the developers lots (see p 227H–I).

(3) When the developers charged the property to the defendant, it relied on the substituted PA which did not confer on it the right to do so. Thus the charge was effected by means of an insufficient instrument and is not valid (see p 228A–B).

Per curiam:

(1) There was nothing in the agreement to show that the first and second plaintiffs entered into the agreement for and on behalf of anyone else. Looking at the agreement objectively it was an incomplete agreement. Where a person signs as attorney, the fact of signing as attorney must be stated clearly at the execution clause (see p 223G–H).

(2) If, as clearly intended, the first and second plaintiffs, had entered the agreement on their own behalf and on behalf of the other co-proprietors, the agreement is highly irregular. The first and second plaintiffs should have made it clear that they were signing in dual capacities. It was difficult to understand how the defendant accepted the agreement despite all the drafting flaws (see p 224F–G).

[Bahasa Malaysia summary

Semua kesebelas plaintif merupakan tuanpunya sebidang tanah. Dalam tahun 1989, plaintif-plaintif ketiga hingga kesebelas telah memberikan plaintif-plaintif pertama dan kedua satu surat kuasa wakil yang tak boleh batal ('SKW'). Antara lain, SKW tersebut memberikan kuasa kepada plaintif-plaintif pertama dan kedua untuk mencagar atau menggadai atau memindahmilikkan tanah-tanah tersebut sebagaimana yang difikirkan betul, sesuai dan perlu oleh wakil-wakil tersebut setakat mana lot-lot pemaju berkatan' dan untuk melantik wakil-wakil pengganti. Berikutan kuasa-kuasa yang diberikan kepada mereka di bawah SKW tersebut, plaintif-plaintif pertama dan kedua telah menandatangani satu perjanjian dengan seorang pemaju dengan pandangan untuk membangunkan bersama hartanah tersebut. Perjanjian tersebut, antara lain, memberikan kuasa kepada pemaju tersebut untuk menggunakan hartanah tersebut 'untuk mendapatkan wang pra-pembangunan dan apabila hakmilik-hakmilik individu dikeluarkan hanya pemaju-pemaju lot-lot tersebut boleh menggadaikan kepada bank dan pemilik-pemilik lot-lot tersebut

akan bebas daripada bebanan'. Walaupun kesemua plaintif-plaintif dinamakan sebagai pemilik tanah dalam perjanjian tersebut, ia telah ditandatangani hanya oleh plaintif-plaintif pertama dan kedua. Pemaju-pemaju tersebut kemudiannya menggadaikan tanah tersebut kepada defendan dalam tahun 1993 sebagai pinjaman sebanyak RM250,000. Pada bulan Oktober 1997, plaintif-plaintif telah diserahkan satu notis merampas harta. Plaintif mendakwa bahawa gadaian tersebut telah didaftarkan tanpa pengetahuan mereka dan memfailkan satu guaman terhadap defendan. Plaintif-plaintif tersebut kemudiannya memohon penghakiman terus, menegaskan bahawa pemaju tersebut hanya diberikan kuasa untuk menggadaikan 'lot-lot pemaju tersebut' dan bukan keseluruhan hartanah tersebut. Adalah juga ditegaskan bahawa pemaju adalah seorang wakil pengganti yang dilantik oleh plaintif-plaintif pertama dan kedua, setelah memasuki perjanjian dengan plaintif-plaintif pertama dan kedua, bagi pihak mereka sendiri dan sebagai wakil pemilik-pemilik bersama lain. Oleh demikian, kuasa mereka untuk menggadaikan hartanah tersebut dihadkan oleh SKW yang pertama. Defendan sebaliknya menghujahkan bahawa perjanjian tersebut adalah satu perjanjian antara kesemua sebelas plaintif-plaintif dan pemaju; bahawa kuasa untuk menggadaikan hartanah tersebut di bawah perjanjian tersebut tidak bergantung kepada SKW yang pertama; bahawa pemaju tersebut bukan seorang wakil pengganti; dan bahawa hak-hak yang diberikan ke atas pemaju tersebut di bawah perjanjian tersebut tidak dihadkan oleh peruntukan-peruntukan SKW yang pertama.

Diputuskan, membenarkan plaintif-plaintif memasuki penghakiman terus:

(1) Perjanjian tersebut adalah satu perjanjian sah yang ditandatangani oleh plaintif-plaintif pertama dan kedua bagi pihak mereka sendiri dan sebagai wakil-wakil untuk pemilik-pemilik bersama (lihat ms 225C): (i) terdapat penegasan nyata dalam afidavit plaintif-plaintif pertama dan kedua menerangkan begitulah kesnya; (ii) penegasan-penegasan tersebut tidak dipatahkan oleh mana-mana afidavit-afidavit defendan, tetapi diterima dalam penghujahan peguam mereka; (iii) adalah atas alasan yang sama antara paintif-plaintif dan defendan bahawa perjanjian tersebut adalah satu perjanjian yang sah (lihat ms 224H–I, 225A–B).

(2) Seorang SKW pengganti tidak boleh mempunyai lebih hak atau kuasa daripada SKW yang asal. Memandangkan perjanjian tersebut dibentuk oleh sebab SKW pertama, ia adalah satu SKW pengganti dan mestilah dihadkan oleh hak-hak plaintif-plaintif pertama dan kedua untuk menggadaikan hanya lot-lot pemaju-pemaju tersebut (lihat ms 227H–I).

(3) Apabila pemaju-pemaju menggadaikan hartanah tersebut kepada defendan, ia bergantung kepada SKW pengganti yang tidak

mempunyai hak untuk berbuat demikian. Oleh itu gadaian tersebut dilaksanakan melalui cara alat yang tidak mencukupi dan tidak sah (lihat ms 228A–B).

Per curiam:

(1) Tiada apa dalam perjanjian untuk menunjukkan bahawa plaintif-plaintif pertama dan kedua telah memasuki perjanjian untuk dan bagi pihak orang lian. Dengan meneliti perjanjian tersebut secara objektif ia merupakan satu perjanjian yang tidak lengkap. Di mana seseorang menurunkan tandatangan sebagai seorang wakil, hakikat menurunkan tandatangan sebagai seorang wakil tersebut mestilah dinyatakan dengan jelas dalam klausa penyempurnaan (lihat ms 223G–H).

(2) Jika, sebagaimana yang nyata dimaksudkan, plaintif-plaintif pertama dan kedua, telah memasuki perjanjian bagi pihak mereka sendiri dan bagi pihak pemilik-pemilik yang lain, perjanjian tersebut adalah di luar aturan. Plaintif-plaintif pertama dan kedua telah menyatakan denga jelas bahawa mereka menurunkan tandatangan sebagai dua kapasiti. Adalah susah untuk memahami bagaimana defendan telah menerima perjanjian tersebut meskipun terdapatnya semua kesilapan pendrafan tersebut (lihat ms 224F–G).]

Notes

For cases on creation of charge, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1599–1600.

Cases referred to

Bryant, Powis and Bryant v La Banque du Peuple [1893] AC 170 (refd)
Rafeah bte Ahmad (the representative of Hj Hassan bin Hj Arshad, deceased) v Bank Bumiputra Malaysia Bhd [1995] 2 CLJ 993 (refd)
Subramania Pillay v Sundaramal [1968] 2 MLJ 115 (refd)

Legislation referred to

National Land Code 1965 ss 254, 340(1), (2)(b), Form 16D
Rules of the High Court 1980 O 14

Francis Tan (Rosni Francis Tan & Ho) for the plaintiffs.
Ting Heng Peng (Amin Tan & Co) for the defendants.

Hishamudin Yunus J: This is an interlocutory application (encl 14) by the plaintiffs for summary judgment against the defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC').

The plaintiffs are the registered proprietors of a piece of land known as GM 640, Lot 1642, Mukim of Semantan, District of Temerloh, Pahang

('the property') as well as two other adjoining parcels of land (which are not the subject matter of the present suit). They were keen to develop the land (together with the two other adjoining parcels of land) to transform it into a housing estate. Accordingly, on 1 August 1989 the third, fourth, fifth, sixth, seventh, eight, ninth, tenth and eleventh plaintiffs granted the first and second plaintiffs an irrevocable power of attorney (in this judgment, I shall be referring to this power of attorney as 'the first power of attorney'). This power of attorney empowers the attorneys to appoint a property developer for the purpose of the intended development. Paragraphs 1 and 2 of this power of attorney stated:

> 1 To enter into an agreement with any reputable housing developer company for the purpose of developing the aforesaid lands into a housing estate or a new town subject to the terms and conditions as our attorneys may think proper, fit and necessary.
>
> 2 The attorneys shall have power to charge or mortgage or transfer the lands as the attorneys think proper, fit and necessary in so far as the developers lots are concerned and for that purpose to sign all the necessary documents.

This power of attorney also empowers the attorneys to appoint substituted attorney (or attorneys) having the same powers as, or less powers than, them. Paragraph 10 of this power of attorney reads:

> To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint.

Subsequently, on 16 March 1990 the first and second plaintiffs entered into a joint-venture agreement ('the agreement') with a company known as Proven Development Sdn Bhd ('Proven') which undertakes to develop the land. Under this joint-venture agreement, Proven is to build houses, shop-houses and infrastructure on the land. A certain number of houses and shop-houses that are to be built by Proven would be allotted to the owners of the land (ie the plaintiffs) once completed. The rest of the houses and shop-houses would be allotted to Proven.

At the formal commencement part of the agreement, it is stated that the agreement is between all the 11 plaintiffs (ie all the registered proprietors of the property) – and they are all named – and Proven. It reads:

> An Agreement made on 16 March 1990 between Young Kee Chan (NRIC No 1325160), Yong Kee Chin @ Yong Kee Yoon (NRIC No 1322164), Wong Ah Chop (NRIC No 1325182, Young Kee Cheong (NRIC No 0258423), Yong Kee Choon @ Yong Kee Kuan (NRIC No 1322222), Yong Kam (NRIC No 7707740), Yong Khee Yen (NRIC No 0565934 E), Yong Kee Kwang (NRIC No 7702544), Yong Ah Chin (NRIC No 1325185), Yong Chee Moi (NRIC No 0924788), Young Moi Chin @ Young Ah Moi (NRIC No 7707781) all care of No 52, Jalan Besar, 28500 Lanchang, Temerloh, Pahang Darul Makmur ('the owners') of the one part and Proven Development Sdn Bhd a company incorporated in Malaysia having its place of business at No 108, Taman Berlian, 27000 Jerantut, Pahang Darul Makmur, Malaysia ('the developer') of the other part.

However, notwithstanding the above provisions, of all the plaintiffs, only the first and second plaintiffs signed the agreement with Proven. The rest did not. This is borne by the fact that only the signatures of the two plaintiffs appear on the execution page (that part of the agreement where the parties are to sign). The signatures of the rest of the plaintiffs do not appear.

It is also important to observe that there is nothing in the agreement that states that the first and second plaintiffs are attorneys of the nine other co-proprietors mentioned in the agreement, or are authorized to execute the agreement as the attorneys of the nine others or on their behalf. Indeed, there is nothing at all in the agreement to show that the two plaintiffs are attorneys. Looking at the agreement objectively, the two plaintiffs appear to have signed the agreement in their personal capacity and on their own behalf, not on behalf, or as attorneys, of anyone else.

However, in paras 6 and 7 of the plaintiffs' affidavit (deposed by the first and second plaintiffs on behalf of all the plaintiffs) at encl 13, it is averred that the first and second plaintiffs signed the agreement on their own behalf as well as the attorneys of the other plaintiffs/co-proprietors pursuant to the power of attorney. The paragraphs read as follows:

> 6 Pada 16 Mac 1990 kami telah menandatangani satu perjanjian usahasama dengan sebuah syarikat yang bernama Proven Development Sdn Bhd untuk memajukan tanah-tanah tersebut. Satu salinan perjanjian tersebut dilampirkan dan ditandakan 'C'.
>
> 7 Kami telah menandatangani perjanjian tersebut *bagi pihak diri kami serta bagi pihak plaintif-plaintif yang lain menurut kuasa-kuasa yang telah diberikan kepada kami melalui SKW tersebut.* (Emphasis added.)

It is important to note that 'kami' in paras 6 and 7 above refers only to the deponents, that is to say, the first and second plaintiffs. The introductory part and para 1 of the affidavit states:

> AFIDAVIT
>
> Kami, YOUNG KEE CHAN (K/P 320908-06-5019) DAN YONG KEE CHIN (K/P 380716-71-5165) adalah warganegara Malaysia yang cukup umur dan beralamat di No 52, Jalan Besar, 28500 Lanchang, Termerloh, Pahang Darul Makmur dengan ini sesungguhnya berikrar dan menyatakan bahawa:
>
> (i) Kami adalah plaintif pertama dan kedua tindakan ini dan kami diarahkan oleh plaintif-plaintif yang lain mendepos afidavit ini bagi pihak mereka juga.

Now, a provision in the agreement confers on Proven an irrevocable power of attorney empowering the directors of Proven to do certain acts (in this judgment I shall be referring to this power of attorney as 'the second power of attorney'). Article 4A of the agreement provides as follows:

> Simultaneously with the execution of this agreement the owners hereby grant the developer an irrevocable power of attorney empowering the directors of the developer to do the following acts namely:
>
> (i) To deal with the relevant authorities with regard to the conversion, subdivision and issuance of separate documents of title to the said land

A and in connection therewith to sign all necessary plans, documents or instruments relating thereto and if necessary to appear before the relevant authority or authorities.

(ii) To submit and sign all building plans, reinforced concrete plans and any other documents necessary and any amendments thereto to obtain approval from the relevant authority or authorities for the construction of
B buildings on the said land.

(iii) To apply to the relevant authority or authorities for the certificate of fitness for occupation of the said buildings when the said buildings are erected.

(iv) To sell the said land known as the developer's lots together with buildings erected thereon to anybody including to the attorney himself and for that purpose to sign the sale and purchase agreement, memorandum of
C transfer and all the necessary documents to effect the transfer of the said land known as the developer's lots.

(v) To negotiate with any bank, finance company, insurance company or any other financial institution established and recognized by the laws of Malaysia to obtain financing required to complete the said project including predevelopment funds: PROVIDED THAT the monies
D obtained therefrom be solely used for the use and completion of the commercial/housing project under this agreement AND any liabilities arising from the said financing obtained by the developer shall be borne solely by the developer and in the event the owners suffer any loss or damage from the said financing obtained by the developer the developer shall compensate and reimburse the owners and the directors of the
E developer personally shall be jointly and severally liable to the owner for the same. AND IT IS FURTHER PROVIDED THAT the developer shall be entitled to use the titles herein for obtaining predevelopment funds and upon the issuance of the individual titles only the developers lots can be charged to the bank and the owners' lots shall be free of encumbrances.

F (vi) To authorize the developer to sign all the relevant documents to give effect to the power of attorney herein created and matters enumerated therein.

The meanings of 'developer's lots' and 'owners' lots" are explained in art 2 of the agreement. To put it simply, 'owners' lots' are a specified number of
G units of shop-houses and houses to be built by Proven on the land, marked in red in the layout plan, which would be allotted to the plaintiffs as owners of the land. 'Developer's lots' means the remaining shop-houses and houses in the layout plan, which would belong to Proven. At the time when the land was charged to the defendant, and even at the time of hearing of the present application, the individual titles to the proposed subdivided lots have yet to
H be issued by the land office.

Armed with this second power of attorney, Proven charged the land to the defendant, a financial institution, for the purpose of securing a loan of RM250,000. The charge was registered on 8 July 1993.

Several years later, in October 1997, the plaintiffs were served with a
I Form 16D notice (service of this notice is the initial stage of a foreclosure proceeding) pursuant to s 254 of the National Land Code 1965 ('the NLC'). On 22 and 23 October 1997, the plaintiffs' solicitor made a search

at the Land Office, District of Temerloh, and discovered that the land had been charged by Proven to the defendant. A

The plaintiffs allege in the statement of claim that the registration of the charge was without their knowledge. The defendant does not rebut this allegation.

Having discovered the charge, the plaintiffs' solicitor wrote a letter of protest to Messrs Amin-Tan & Co, the defendant's solicitors, and demanded that the defendant take steps to discharge the charge. But the defendant did not take any such action. B

Hence, the plaintiffs filed the writ and statement of claim on 29 October 1997. In the main action, the plaintiffs are seeking, inter alia: C

(a) a declaration that the charge on the property registered by the defendant be declared null and void; and

(b) an order that the registration of the charge be set side and the memorial of the charge be deleted from the Register of Titles and the issue document of title. D

Proven is not a party to this action; nor did it file any affidavit on behalf of either the plaintiffs or the defendant.

The plaintiffs contend that the charge was registered by the defendant by means of an insufficient instrument and was, therefore, null and void. The plaintiffs further argue that by reason of sub-s (2)(b) of s 340 of the NLC the defendant cannot claim indefeasibility of interest under s 340(1) of the same. The relevant provisions of the Code read: E

> 340 Registration to confer indefeasible title or interest, except in certain circumstances:
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible. F
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) ...
>
> (b) where registration was obtained by forgery, or by means of an *insufficient* or void instrument; ... . G

It is the submission of the plaintiffs' counsel, En Francis Tan, that there is no serious question to be tried, and that what is in issue is purely the question of the interpretation of art 4A (the second power of attorney) of the agreement; and he contends that art 4A of the agreement is in essence a substituted power of attorney and does not give Proven the power to charge the land to the defendant. He argues that the words: H

> ... and upon the issuance of individual titles only the developer's lots can be charged to the bank and the owners' lots shall be free of encumbrances.

means that Proven could only charge the 'developer's lots' (and this can only be done after the subdivisions have been approved by the relevant authority and individual titles for the subdivided lots have been issued); I

A Proven could not charge the whole piece of land (GM 640, Lot 1642) itself. He further submits that Proven, being a substituted attorney appointed by the attorneys of the first power of attorney, is restricted in its power to charge the property by virtue of para 2 of the first power of attorney.

Learned counsel for the defendant, En Ting Heng Peng, on the other B hand, contends that art 4A, that is to say, the power of attorney created by the agreement, in particular, the words:

> AND IT IS FURTHER PROVIDED THAT the developer shall be entitled to use the titles herein for obtaining predevelopment funds

empowers Proven to charge the land itself in order to raise funds for the C purpose of the development project on the land. Learned counsel seeks to preserve the validity of the charge by relying on s 340 (1) of the NLC (the principle of indefeasibility of title or interest). He further submits that the second power of attorney is not a substituted power of attorney nor is Proven a substituted attorney.

D Now, before I deliberate on the interpretation of art 4A and the status of Proven as an attorney, there is an issue that needs to be disposed first: Who actually are the parties to the agreement? Learned counsel for the plaintiffs submits that the agreement is an agreement between the first and second plaintiffs only, on their own behalf and as attorneys of all the other co-owners, on the one hand, and Proven as the other party. In other words, E the other co-proprietors (that is to say, the third, fourth, fifth, sixth, seventh, eight, ninth, tenth and eleventh plaintiffs), who are also the donors of the first power of attorney, are not parties to the agreement.

Learned counsel for the defendant, on the other hand, while accepting that the agreement is signed by the first and second plaintiffs as co-F proprietors as well as the attorneys of all the other co-proprietors, contends that as the introductory part of the agreement mentions the names of all the plaintiffs/owners as parties to the agreement, therefore, the agreement is an agreement between all the 11 co-proprietors/plaintiffs and Proven.

But before I touch on these issues raised, I am unable to resist making the remark that I am tempted to regard this agreement as an invalid G agreement for the following reasons. The formal commencement part of the agreement clearly states that all the 11 plaintiffs/registered co-proprietors are parties to the agreement. Yet on the execution page only two out of the 11 named in the agreement (ie the first and second plaintiffs) signed the agreement: the rest did not. Second, as I have pointed out earlier, there is H nothing in the agreement showing that the two plaintiffs entered into or signed the agreement as attorneys (indeed, not even as being on behalf of all the landowners — if at all this is worth anything). Thus, looking at the agreement objectively it is an incomplete agreement; in terms of ascertaining who actually are the parties to the agreement, the agreement does not make sense.

I In *Powers of Attorney* by Trevors Aldridge (8th Ed, Longman) the proper manner of executing an agreement or deed by an attorney is prescribed as follows at p 62:

The normal form of execution of a deed by an attorney is: A

A B [donor]
by his attorney
C D [attorney]
An alternative is:
C D [attorney] B
as attorney for and on behalf of
A B [donor]

In *Drafting Commercial Agreements* by AGJ Berg (1991, Butterworths), it is stated (at p 14): C

If a person will sign under a power of attorney, this should be stated:

SIGNED by
William Pyle Taunton
For and on behalf of
BOSANQUET AND PULLER PLC D
Under a power of attorney
Dated 5 March 1991

To put the matter briefly, where a person signs an agreement as an attorney, the fact of signing as an attorney must be stated clearly at the execution clause. It is not a matter to be taken lightly or one that could be just glossed over. E

If the first and second plaintiffs had intended to enter the agreement on their own behalf as co-proprietors of the property as well as attorneys, and I have no doubt that that was their intention, then, judging by the manner it is drafted, the agreement is highly irregular. The first and second plaintiffs F should have made it clear that they were signing in their dual capacities: (i) as registered co-proprietors and parties to the agreement in their own right; and (ii) also as attorneys of the other co-proprietors/parties to the agreement. In other words, the signatures of the first and second plaintiffs on the execution page should not have been affixed in the manner that we now see. It is difficult to understand how the defendant (and their legal G advisers, if at all they had been consulted) could have accepted the second power of attorney, despite all these drafting flaws.

Be that as it may, upon deeper reflection, notwithstanding the misgivings that I have on the agreement, I am inclined to take the view that justice demands that I should resist the temptation to rule the agreement H invalid. To my mind, the wiser approach is to hold — and I so hold — that the two plaintiffs/co-proprietors who signed the agreement did so on their own behalf as co-proprietors as well as the attorneys of the other registered co-proprietors, and that the agreement is a valid agreement. I so hold on the basis of the following considerations. First, there are the clear averments in paras 6 and 7 of the first and second plaintiffs' affidavit (which I have I alluded to earlier in this judgment) explaining that the first and second plaintiffs signed the agreement on their own behalf and as attorneys of the

other co-proprietors. Second, the averments therein are not rebutted by any of the defendant's affidavits. On the contrary, and as I have pointed out, learned counsel for defendant, in his written submission, accepts that the two signed the agreement on their own behalf and as attorneys of the landowners. Third, between the plaintiffs and the defendant, it is common ground that the agreement is a valid agreement.

Accepting this as the position, I shall now revert to the question that I posed earlier: Who entered the agreement with Proven? Is it an agreement between the first and second plaintiffs, on their own behalf and as attorneys of the landowners on the one part and Proven as the other party? Or, is it an agreement between all the 11 plaintiffs/registered co-proprietors and Proven?

The plaintiffs submit that it is an agreement between the first and second plaintiffs, on their own behalf and as attorneys of the other co-owners, and Proven; that the second power of attorney is in effect an exercise by the first and second plaintiffs, as attorneys, of their powers under para 10 of the first power of attorney to appoint Proven as a substituted attorney; and that, bearing in mind the restriction on the power to charge imposed by para 2 of the first power of attorney, the rights conferred upon Proven by the second power of attorney cannot be greater than the rights conferred upon the first and second plaintiffs by the first power of attorney.

The defendant, on the other hand, submits that the agreement is an agreement between all the 11 plaintiffs/registered co-proprietors and Proven; that the second power of attorney is independent of para 10 of the first power of attorney; that Proven is not a substituted attorney; and that the rights conferred on Proven under the second power of attorney are not restricted by the provisions of the first power of attorney.

First, let us go to fundamentals and consider the meaning and purpose of a power of attorney. In *Powers of Attorney* referred to earlier, 'power of attorney' is defined as follows (at p 1):

> 3 Definition: power of attorney
> A power of attorney is a document by which one person ('donor') gives another person ('attorney') the power to act on his behalf and in his name. It may be completely general, entitling the attorney to — almost — everything the donor could himself do, or it may be limited to certain defined objects. The practical purpose of a power of attorney is not only to invest the attorney with power to act for the donor, but also to provide him with a document defining the extent of his authority, which he can produce as evidence to the third parties with whom he is to deal.

A power of attorney creates a principal-agent relationship between the donor and the donee. As a general principle of agency, any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made (see *Halsbury's Laws of England* (4th Ed) Vol 1(2), p 96, para 137).

In my judgment, the agreement is an agreement between the first and second plaintiffs, as co-proprietors as well as the attorneys of the other

registered co-proprietors of the property, and Proven. It is true that the names of the nine other co-proprietors are mentioned at the formal commencement part of the agreement as parties to the agreement. But this fact by itself does not make the other nine parties to the agreement. They are not parties if they are not signatories to the agreement. Their names are mentioned merely because, as a matter of practice, it is advisable and convenient for an attorney to exercise the powers granted to him in the donor's name. In *Powers of Attorney* (earlier referred to), it is stated (at p 62):

> 1 Using donor's name
>
> It is generally advisable and convenient for an attorney to exercise the powers granted to him in the donor's name. If he contracts in his own name, and he can generally choose that alternative, the third party with whom he is dealing will not be put on notice that the attorney is contracting on the donor's behalf. The attorney then runs the risk of incurring personal liability.

I must, however, add that although the agreement is not an agreement between all the named registered co-proprietors and Proven, nevertheless the agreement is not only an agreement entered into by the two plaintiffs in their own capacity as co-proprietors but is also an agreement entered into by the two attorneys in the name and on behalf of the other co-proprietors; and the agreement, provided the terms thereof are within the scope of the first power of attorney, is binding on the donors (ie the other co-proprietors). In other words, the agreement may be enforced against all the co-proprietors by Proven and vice versa.

Now, the principle is that powers of attorney are to be construed strictly. In *Bryant, Powis and Bryant v La Banque du Peuple* [1893] AC 170, the Privy Council said (at p 177):

> ... powers of attorney are to be construed strictly — that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

The above principle was adopted by the Federal Court in *Subramania Pillay v Sundaramal* [1968] 2 MLJ 115 (and see also *Rafeah bte Ahmad (the representative of Hj Hassan bin Hj Arshad, deceased) v Bank Bumiputra Malaysia Bhd* [1995] 2 CLJ 993).

The other principle is that:

> General words used in conferring the power [in the power of attorney] are construed as limited by reference to the special powers conferred, but incidental powers necessary for carrying out the authority will be implied. (*Halsbury's Laws of England* (4th Ed) Vol 1(2), p 39, para 46)

Bearing the above principles in mind, in my judgment, the power of attorney granted to Proven (ie the second power of attorney) does not empower the company to charge the property to the defendant. First, the words ('the first limb'):

> AND IT IS FURTHER PROVIDED THAT the developer shall be entitled to use the titles herein for obtaining pre-development funds ...

appearing in sub-para (v) of art 4A in the second power of attorney cannot be read in isolation. They must be read together with the following words ('the second limb') that immediately follow:

> ... and upon the issuance of individual titles only the developer's lots can be charged to the bank and the owners' lots shall be free of encumbrances.

I consider the first limb as powers conferred by 'general words' and the second limb as conferring the 'special powers'. I consider the second limb as conferring special powers because the powers are spelt out more in detail and are more specific (for example, the words 'charged', 'bank', 'owners lots' and 'free of encumbrances' are specifically mentioned), as compared to the powers in the first limb, which are vaguely worded. Applying the principle as stated in *Halsbury's* (as I have cited), the special powers limit the powers conferred by general words. In other words, when both limbs are read together, as follows:

> AND IT IS FURTHER PROVIDED THAT the developer shall be entitled to use the titles herein for obtaining pre-development funds and upon the issuance of individual titles only the developers lots can be charged to the bank and the owners lots shall be free of encumbrances

the whole proviso must be taken to mean that:

(a) the property can be charged by Proven to a bank only after individual titles have been issued (at the time of the hearing of the present case they are yet to be issued);

(b) only the lots allotted to Proven ('developer's lots') can be charged; and

(c) the lots allotted to the plaintiffs/registered proprietors ('owners' lots') are to be free from any encumbrances.

There is, however, another reason why I hold that Proven has no power to charge the property. The second power of attorney was created by virtue of para 10 of the first power of attorney. It is a substituted power of attorney. As such, it must be read as being subject to para 2 of the first power of attorney. This para 2 clearly restricts the first and second plaintiffs' right to charge the property. That paragraph reads as follows:

> The attorneys shall have power to charge or mortgage or transfer the lands as the attorneys think proper, fit and necessary *in so far as the developer's lots are concerned and for that purpose to sign all the necessary documents.* (Emphasis added.)

It is clear from the above provision that the power of the attorneys under the first power of attorney to charge the property was restricted. Now, in my opinion, the principle must be that Proven, being a substituted attorney, cannot have more rights or powers than the original attorneys (the first and second plaintiffs). It is clear from para 2 above that the first and second plaintiffs, under the first power of attorney, could only charge the lots allotted to the developer. The two could not charge the whole land. If the

original attorneys could not charge the whole land, neither could the substituted attorney. A

It follows, therefore, that when Proven charged the property to the defendant by relying on the second power of attorney, it had relied on an instrument that did not confer on it the right to do so. In other words, the charge was effected by means of an insufficient instrument. The charge, therefore, is not valid. It is null and void. Section 340(1) of the NLC does not protect such an interest. B

In *Halsbury's* referred to earlier in this judgment, it is stated (at p 39, para 47):

> There must be strict adherence to the authority conferred by power of attorney. If the agent in the pretended exercise of his authority acts in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principle liable. C

Based on the reasons given above, I am satisfied that there is no defence to the plaintiffs' claim.

This application for summary judgment is granted with costs. D

Application allowed.

Reported by Andrew Christopher Simon

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